

1 focus more on the in-region rivals than on the
2 out-of-region cable companies, right?

3 A I think there's good argument to
4 do that. However, for the purpose of this
5 test, right, I give weight to everyone.
6 Right?

7 Q I understand. But elsewhere in
8 your report, you argue that the in-region
9 rivals deserve more emphasis and more credit
10 than the out-of-region cable companies, right?

11 A I think that is fair. I think
12 that is fair.

13 Q And one of the reasons that you
14 cite for that is that you think the cable
15 companies are all colluding not to deal with
16 the NFL Network. Isn't that right?

17 A I think there is very good
18 evidence in the record and very good evidence
19 in the academic literature that the cable
20 operators make joint decisions with respect to
21 unaffiliated networks, yes.

22 Q Okay. Let's try to run through

1 the evidence that you cite as I recall it.
2 Now, one piece of evidence that you cite to
3 support that proposition is that Time Warner
4 and Comcast in 2002 jointly negotiated through
5 In Demand for access to the NFL Sunday Ticket.
6 Do you recall at that point?

7 A I recall. And I think that I said
8 that they jointly bid for NFL programming
9 twice. That's my memory anyway.

10 Q And I guess let's refer to your
11 written direct testimony, which is exhibit
12 189. I guess if we could go to paragraph 92
13 of that testimony, which is page 52?

14 A I'm on page 52.

15 Q Okay. In paragraph 92, you say,
16 "Moreover, given the previous coordinated,"
17 italicized, "effort by Time Warner and Comcast
18 to secure NFL programming content through
19 their In Demand system, the carriage decision
20 of at least Time Warner vis-a-vis NFL Network
21 should be further discounted." Do you see
22 that?

1 A Yes.

2 Q And then you say, "In 2002,
3 Comcast and Time Warner jointly did" --
4 "jointly" was italicized -- "for nonexclusive
5 rights to the NFL Sunday Ticket." Do you see
6 that?

7 A Yes.

8 Q So why is this joint bid in 2002
9 relevant to determining whether we should give
10 weight to the fact that Time Warner doesn't
11 carry the NFL Network today?

12 A Right. Because this is one --
13 (Whereupon, the foregoing matter
14 went off the record briefly.)

15 THE WITNESS: To recap, I in my
16 market penetration test at the end of the day
17 give equal weight to the cable guys and to the
18 non-cable guys.

19 But I am coming up with reasons
20 here for why the decisions by other cable
21 operators, in particular, Time Warner, should
22 be given less weight. And that is based on

1 the fact that Time Warner and Comcast have a
2 history of bidding jointly for NFL
3 programming.

4 So when Comcast stands back and
5 says, "Look at that decision of Time Warner,"
6 to the extent that that is not a unilateral
7 decision, then we really can't credit it as
8 another independent vote to not carry NFL.

9 And I offer multiple evidence
10 here. During my deposition, I offered another
11 one, which I actually think is the most
12 important, which is the Paul Tagliabue
13 comment, saying that the threat came down as
14 -- he would retaliate, Brian Roberts would
15 retaliate through an industry, a cable
16 industry, response, not the response of
17 Comcast.

18 I should -- in looking back, I
19 should have made that the number one piece of
20 evidence, not the last.

21 BY MR. BURKE:

22 Q Dr. Singer, again, if you can try

1 to answer my question, I asked you about the
2 coordination with Time Warner regarding this
3 bid, not anything about Commissioner
4 Tagliabue. It will make this process go a
5 little more efficiently if you try to answer
6 my question. Can we try to do that?

7 A Sure.

8 Q So it's your testimony that the
9 fact that Comcast and Time Warner jointly
10 negotiated for NFL rights in 2002 through In
11 Demand. That suggests a propensity in the
12 future to act jointly with respect to the NFL
13 in later circumstances?

14 A Yes but not just in isolation, in
15 conjunction with all of the other evidence I
16 present of coordinated or concerted action.

17 Q I understand. I am trying to
18 focus on each piece at a time.

19 A Okay.

20 Q And this is the only piece that is
21 specific to Comcast and Time Warner. Isn't
22 that right?

1 A No. In Brian Roberts' testimony,
2 he mentions -- sorry. In Paul Tagliabue's
3 testimony, he mentions Time Warner in
4 particular. He says that the threat that came
5 from Brian Roberts was not that Comcast was
6 going to retaliate but that the cable industry
7 was going to retaliate and citing Time Warner
8 in particular.

9 Q His concern was about Time Warner,
10 not that Brian Roberts said Time Warner would
11 retaliate?

12 A I think that he mentioned Time
13 Warner as coming out of the mouth of Brian
14 Roberts.

15 Q Well, we will --

16 JUDGE SIPPEL: Brian Roberts is
17 the CEO of Comcast. Is that correct?

18 MR. BURKE: That is correct, Your
19 Honor.

20 THE WITNESS: Yes, sir.

21 BY MR. BURKE:

22 Q Now, would it have affected your

1 analysis, Dr. Singer, if you knew that it was
2 at the insistence of the NFL that Comcast and
3 Time Warner negotiated jointly with the NFL in
4 2002?

5 A It would be an important factor
6 that I want to consider. It's -- I don't know
7 if I would want to strike that piece of
8 evidence. Like I said, that piece of evidence
9 is one of several that I put forward in
10 support of the coordinated carriage
11 hypothesis.

12 Q So the NFL didn't tell you that,
13 in fact, it was them who asked and demanded
14 that Comcast and Time Warner jointly negotiate
15 with them over access to the NFL Sunday Ticket
16 in 2002?

17 A They did not tell me that, no.

18 MR. BURKE: I would like to mark
19 this next document for identification as
20 Comcast exhibit 400, if I may, Your Honor.

21 JUDGE SIPPEL: Okay. This is a
22 letter, October 2, 2002, on National Football

1 League stationery signed by Mr. -- it appears
2 to be Mr. Jeffrey Pash.

3 That will be marked for
4 identification as Comcast number 400. Is that
5 right?

6 MR. BURKE: That is correct, Your
7 Honor.

8 JUDGE SIPPEL: For identification,
9 it is Comcast number 400.

10 (Whereupon, the aforementioned
11 document was marked for
12 identification as Comcast Exhibit
13 Number 400.)

14 MR. BURKE: Now, this is not a
15 document that was shared to which Dr. Singer
16 is a recipient. So I don't think we can use
17 Dr. Singer to himself identify it, but it is
18 plainly a business record of the National
19 Football League, which I think we should be
20 able to admit as evidence.

21 MR. SCHMIDT: I guess the only
22 question I would ask is I don't know where

1 this is from. It hasn't been produced in this
2 litigation as far as I can tell.

3 MR. BURKE: That is right. It is
4 outside the date range of your document
5 requests.

6 MR. SCHMIDT: You are now using
7 something with the witness that has not been
8 produced in this litigation? We object to
9 that.

10 MR. BURKE: Your Honor, it wasn't
11 asked for in the litigation. There are lots
12 of things in our documents we're going to
13 cross this witness on that haven't been
14 produced. They weren't asked for.

15 MR. SCHMIDT: It's one thing if
16 it's a public document. It's another thing if
17 it's a document you have in your files.

18 And I understand there is an NFL
19 header on that. I don't dispute that. It
20 does look like an NFL document. But I just
21 think it's unfair that you are showing things
22 that haven't been produced in the litigation.

1 That is not how, as I understand
2 it, litigation is supposed to work,
3 particularly as to non-public documents.

4 MR. BURKE: I mean, it is a
5 document that is from your files. I don't see
6 how --

7 MR. SCHMIDT: It's not from our
8 files. It's got the names of your --

9 MR. BURKE: Well, it's not --

10 MR. SCHMIDT: Let me finish,
11 please.

12 JUDGE SIPPEL: Let Mr. Schmidt
13 finish.

14 MR. SCHMIDT: It is a document
15 that, as far as I can tell, came from us. I'm
16 not disputing that. I don't know that one way
17 or the other, but it certainly looks like it
18 came from us. But it's a document from your
19 files. It has your employees listed on it in
20 I assume their handwriting.

21 I just think fairness dictates
22 that if you are using documents like this with

1 witnesses, there is some stash of documents
2 that you have that you tend to use that you
3 haven't produced. And they come from your
4 files. I think it is incumbent on you to
5 share them.

6 MR. BURKE: Well, I mean, I would
7 say that the allegations of conspiratorial
8 conduct which focus on this are relatively
9 recently made.

10 We have located this document as
11 part of our preparation for the
12 cross-examination of this witness. It was not
13 called for by any discovery request.

14 I think this is what
15 cross-examination is about, Your Honor. We
16 are entitled to look and find additional
17 evidence.

18 MR. SCHMIDT: And if I may speak
19 on that, cross-examination is not about using
20 evidence that has never been produced. You
21 are allowed to use evidence that the witness
22 may not have seen as part of a litigation.

1 We have gone out of our way to
2 give you documents as they become available,
3 including the last document that we showed Dr.
4 Singer. We didn't surprise that on you. We
5 gave it to you as soon as we had it.

6 MR. BURKE: Again, that is part of
7 Dr. Singer's direct testimony. So that's --

8 JUDGE SIPPEL: Does the witness
9 know anything about this letter?

10 MR. BURKE: Well, the witness is
11 relying on the fact that in 2002, Comcast and
12 Time Warner acted jointly. What we are trying
13 to show, Your Honor, through this letter is
14 that, in fact, that was at the request of the
15 NFL itself. The NFL wrote a letter asking
16 Comcast and Time Warner to act jointly.

17 JUDGE SIPPEL: It doesn't say who
18 it is even addressed to. It says, "In
19 Demand." Is that LLC? Is that a joint
20 venture or something?

21 MR. BURKE: That is correct, Your
22 Honor.

1 MR. SCHMIDT: As I look at this,
2 not one name listed on this document is a
3 witness in this case.

4 JUDGE SIPPEL: Well, the witness
5 cannot identify this letter. You're just
6 wanting to get it admitted as an admission of
7 conspiracy.

8 MR. BURKE: Or as actually
9 refuting his allegation of conspiracy, Your
10 Honor.

11 JUDGE SIPPEL: Or refuting his
12 allegation of conspiracy.

13 MR. BURKE: Correct.

14 MR. SCHMIDT: I don't think it
15 speaks to, Your Honor --

16 JUDGE SIPPEL: Conspiracy in this.
17 I'm going to sustain the objection because it
18 has not been shown how this letter relates to
19 anything that this witness is testifying to or
20 that he has in connection with his knowledge.

21 Your cross-examination is with
22 respect to questioning the ability or the

1 correctness of this witness' opinions. And
2 the witness has not considered this evidence
3 in formulating his opinion.

4 MR. BURKE: Okay.

5 JUDGE SIPPEL: I'm going to reject
6 it. However, it is marked for identification
7 and will go with the case as a rejected
8 exhibit unless you are able to tie it in later
9 on.

10 MR. BURKE: I guess what I would
11 say, Your Honor, is there are two different
12 questions, whether we want to question Dr.
13 Singer about this. We think it refutes his
14 allegations and one of the premises of his
15 testimony, which is that there was
16 coordination between Comcast and Time Warner.

17 If I can make a proffer on that, I
18 will be happy to.

19 JUDGE SIPPEL: This is unreliable.
20 We don't know who Jeffrey Pash is. We don't
21 know why he wrote this letter. We don't know
22 a lot of answers to a lot of questions.

1 And so right now the way the
2 document looks, it is just unreliable for the
3 purposes, the conclusions that you are
4 seeking.

5 MR. BURKE: Okay.

6 JUDGE SIPPEL: But it will be left
7 in the record as a rejected exhibit.

8 MR. CARROLL: Your Honor, if I
9 may?

10 JUDGE SIPPEL: Sir?

11 MR. CARROLL: Commissioner
12 Tagliabue is going to testify here on
13 Thursday. I am very confident that
14 Commissioner Tagliabue will be able to
15 authenticate this document.

16 Jeffrey Pash was the General
17 Counsel of the NFL. It's a letter from the
18 General Counsel of the NFL that refutes the
19 statement that was just given by their expert.
20 And the fact that he didn't know about it is
21 the whole point.

22 And I'm happy to ask Commissioner

1 Tagliabue and to have this exhibit accepted on
2 condition that when Commissioner Tagliabue is
3 here on Thursday he authenticates this
4 document.

5 MR. SCHMIDT: Your Honor, this was
6 not signed by Commissioner Tagliabue. We have
7 no basis to know whether he has factual
8 knowledge of what led up to this document.

9 We have two concerns here. One is
10 it's being offered -- the witness has already
11 been asked, "Would it change your opinion if
12 you knew this was true?" That's the testimony
13 they're seeking through this document.

14 Now they're trying to go one step
15 further. And they are trying to say, "You
16 were wrong. And I will prove it through this
17 document, even though I don't have a
18 custodian."

19 The second concern we have is we
20 have an exhibit process. We have a discovery
21 process. And my colleagues on the opposing
22 side have been using exhibits as

1 cross-examination pieces that were not on
2 their exhibit list. We haven't objected to
3 that because that's okay provided they have
4 been produced.

5 This is something that they have
6 in their files that they knew they were going
7 to use that was never produced. We think that
8 is not the way the litigation, that is not the
9 way any litigation, works. And this is not
10 our understanding of how this litigation
11 works.

12 If you have documents in your
13 files that you intend to use in litigation,
14 you turn them over. You don't wait until you
15 are cross-examining a witness who knows
16 nothing about them to turn it over for the
17 first time. I can't even --

18 JUDGE SIPPEL: Wait. Wait. Wait.
19 You're throwing too many things out at the
20 same time.

21 MR. SCHMIDT: I'm sorry, Your
22 Honor.

1 JUDGE SIPPEL: Wait. Let me ask
2 you this question. Did NFL ask in your
3 discovery for all documents that Comcast might
4 have that relate to NFL? I mean, did you ask
5 for this document?

6 MR. SCHMIDT: No, we didn't ask
7 for this document, Your Honor. We tailored
8 our discovery in a focused way because there
9 was limited discovery before this Court.

10 But where we have had documents,
11 we intended to use that come from our files,
12 we have produced them because that is the
13 normal obligation in discovery so you don't
14 find yourself in a situation like this where
15 you see a document for the first time in your
16 life and you have no understanding of the
17 background of it, if this is a response to
18 some proposal from Comcast and Time Warner, if
19 they initially made the proposal. We have no
20 idea of that.

21 JUDGE SIPPEL: Well, I have
22 already ruled on that in your favor.

1 MR. SCHMIDT: Okay. Then that's
2 all --

3 JUDGE SIPPEL: I don't know where
4 you're trying to take this right now. Because
5 Mr. Carroll suggested that Mr. Tagliabue could
6 shed some light on this letter?

7 MR. SCHMIDT: Yes, Your Honor.

8 JUDGE SIPPEL: Mr. Tagliabue isn't
9 coming in until Thursday. Today is Tuesday if
10 I am counting right. Yes. So he can look at
11 it. You can talk to him about it. It's only
12 a couple of sentences. I'm not going to be
13 surprised by it.

14 MR. LEVY: Your Honor, may I
15 simply invite your attention because this
16 issue may be a recurring one to your further
17 revised procedural hearing order, which was
18 released on February 3rd, 2009?

19 In footnote 4, Your Honor ordered
20 that "Hearing exhibits and written direct
21 testimony must be received by all parties and
22 the presiding judge not later than this date,"

1 "this date" basically referring back to April
2 6th." We haven't been provided with this
3 document. It ought to be barred for that
4 reason.

5 I am happy to share this order
6 with you if you --

7 JUDGE SIPPEL: No. That's all
8 right. I have it. But that is beside the
9 point. This is cross-examination. I
10 understand. Well, you do have a good point
11 because this is not cross-examination. We are
12 hearing the testimony for the first time up
13 here.

14 They have had this in writing for
15 some period of time and can study it and
16 whatnot. But I don't know of any requirement
17 that a party has to disclose in advance what
18 it is going to ask on a cross-examination or
19 what documents it is going to show as long as
20 the document had some reliability.

21 Now, if you want more time to look
22 at the document, to examine the document? And

1 you do have a standing objection on the basis
2 that there has been no foundation laid. And
3 I've granted your objection.

4 MR. CARROLL: We will declare a
5 victory and stop.

6 JUDGE SIPPEL: It is not written
7 in stone someplace that you can't come in with
8 a cross-examination document that the other
9 side has never seen before.

10 MR. CARROLL: Fair enough. We
11 will declare a victory and stop, Your Honor.

12 MR. BURKE: I wouldn't declare
13 victory too soon. As I understand it, there
14 is nothing to preclude me from having former
15 Commissioner Tagliabue authenticate this
16 document on Thursday.

17 JUDGE SIPPEL: Well, I'm not sure
18 of that. I am not going to agree with that
19 conclusion, but I am saying you can show it to
20 Commissioner Tagliabue on Thursday.

21 And he is going to have an
22 opportunity to see it before Thursday. And he

1 is going to be able to consult with Mr. Pash
2 or anybody else he wants to consult with.

3 So he is not going to be surprised
4 by this. You are surprised. I am surprised.
5 The witness is surprised. But the
6 commissioner will not be surprised. And that
7 really is the only -- the only objection is an
8 objection of fairness and surprise.

9 You can't ambush. You know, and
10 does this come up to being an ambush? You
11 know, obviously you are feeling it does.

12 But I have ruled. I have ruled in
13 your favor on other reasons. There's no
14 foundation for this yet.

15 MR. LEVY: We appreciate that,
16 Your Honor.

17 MR. CARROLL: And, Your Honor,
18 Thursday is another day. Can I just confirm
19 that the document will not come into evidence
20 yet?

21 JUDGE SIPPEL: No.

22 MR. CARROLL: But this witness can

1 be asked whether he has ever seen it before
2 and whether it is consistent or inconsistent
3 with this opinion that he has already given.

4 JUDGE SIPPEL: I have no problem
5 with that use for it.

6 MR. CARROLL: Thank you.

7 JUDGE SIPPEL: But it's not coming
8 in as evidence. We're being offered --

9 MR. SCHMIDT: And we don't object
10 to that use, Your Honor. That's the problem
11 we --

12 JUDGE SIPPEL: Okay. Then let's
13 stop

14 MR. BURKE: Okay. Good. Then
15 let's stop. It's getting late there. You go
16 ahead, Mr. Burke.

17 MR. BURKE: Okay. Well, I think
18 we had actually pretty much finished up on
19 that.

20 BY MR. BURKE:

21 Q You have never seen this document
22 before, have you, Dr. Singer?

1 A Correct.

2 Q And you are not aware of the fact
3 that the NFL if, in fact, it happened
4 requested that In Demand and its owners meet
5 with the NFL to discuss the NFL Sunday Ticket
6 in 2002?

7 A I'm sorry? Can you say that back?
8 Because I don't see how this supports your
9 contention. I was kind of chuckling when we
10 went through that whole rigmarole.

11 But do you want to read that back
12 to me, please? And I will see --

13 Q I will try to rephrase it.

14 A It says, "This is to confirm that
15 with respect to the right to distribute, the
16 NFL Sunday Ticket package to the cable
17 industry, the NFL has requested In Demand and
18 representatives of its MSO owners to attend
19 and participate in the relevant meetings,"
20 right?

21 A When I say, "What does that tell
22 us?" you are suggesting that --

1 Q There is no question pending.

2 A -- that the NFL created --

3 JUDGE SIPPEL: Wait a minute.

4 Wait a minute. He's trying to answer what you
5 said.

6 MR. BURKE: I just read it.

7 JUDGE SIPPEL: He's responding to
8 it, which he has been asked to do.

9 THE WITNESS: Right. Thank you.
10 What we don't have here is what came before
11 this. Did In Demand, Time Warner, and Comcast
12 get together and approach NFL for the ticket
13 as a joint venture called In Demand? If so,
14 then this letter is just saying we want you
15 guys to show up to the next meeting.

16 JUDGE SIPPEL: Well, wait. Wait.
17 Wait. Now you are starting to investigate the
18 letter. That's my problem. The question is
19 you said you had never seen it before. You've
20 read it now. And the question is, does it
21 change anything that you testified to today
22 having read it?

1 THE WITNESS: No, it doesn't.

2 JUDGE SIPPEL: Okay. Bingo.

3 Let's go.

4 BY MR. BURKE:

5 Q So go on to the next. One of the
6 things that you cited in support of your view
7 that the cable companies are colluding is an
8 article by Professor Kang. Do you recall
9 that, Dr. Singer?

10 A I do. And I'm sensitive to you
11 saying that they are colluding. My hypothesis
12 is that the carriage decisions are not made
13 independently.

14 Q Now, the conclusion of that
15 article was that a vertically integrated MSO
16 is more likely to carry the programming of
17 another vertically integrated MSO. Isn't that
18 right?

19 A And less likely to carry the
20 programming of a nonaffiliated --

21 Q That's the piece I wanted to
22 understand. I mean, my reading of this